IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1547

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

-vs-

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

Harold H. Bredell
C. Wendell Martin
Lawrence McTurnan
BREDELL, MARTIN & McTURNAN
2430 Indiana National Bank Tower
One Indiana Square
Indianapolis, Indiana 46204
(317) 639-4294

Attorneys for Petitioners

Of Counsel:
Lila J. Young
Bredell, Martin & McTurnan
2430 Indiana National Bank Tower
Indianapolis, Indiana 46204

INDEX

	Page
Table of Authorities	ii.
Questions Rewritten	1
Elementary Schools	4
Rule 1.1.1.3 (Disruption Rule)	5
Rule 1.3.1.1 (Distribution During Class Hours)	7
Prior Restraint	8
Obscenity	11
Conclusion	13

TABLE OF AUTHORITIES

CASES

	Page
Baker v. Downey City Board of Education (D.C. Cal. 1969), 307 F. Supp. 517	3
Burnside v. Byers (5th Cir.), 363 F. 2d 744	7
Cohen v. California, 403 U.S. 15, (1971)	12
Eisner v. Stamford Board of Education (2nd Cir. 1971), 440 F. 2d 803	5, 6
Esteban v. Central Missouri State College (W.D. Mo., 1968), 290 F. Supp. 622, aff'd 415 F. 2d (8th Cir. 1969), cert. den. 398 U.S. 965	3
Hatter v. State Board of Education (9th Cir. 1971), 452 F. 2d 673	8
Jones v. State Board of Education (D.C. Tenn. 1968), 279 F. Supp. 190, aff'd (6th Cir.) 407 F. 2d 834, cert. gr. 396 U.S. 817, cert. dism'd. 397 U.S. 31, Reh. den. 397 U.S. 1018.	2, 3
Papish v. University of Missouri Curators (1973), 410 U.S. 667, 677	3

Quarterman v. Byrd (4th Cir., 1971), 453 F. 2d 54 at 59, n. 10 7

Sill v. Pennsylvania State University (3rd Cir., 1972), 462 F. 2d 463 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1347

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

Questions Rewritten

Respondents' obvious purpose in completely rewriting the questions presented by petitioners is to hopefully omit certain of petitioners' questions (questions 1, 3 and 4) presented and to

confuse rather than clarify the remaining issues (particularly question 5).

Respondents' alleged "justification" for this most irregular and highly improper attempt to select and confuse the questions presented to this Court for review is that an issue in one of the petitioners' questions (1 a) was neither urged and briefed below, nor considered by the Court of Appeals. This simply is not true. Question 1 a concerns whether the Appellate Court erred by applying to Board regulations the identical constitutional standards and tests for vagueness and overbreadth which are applicable to criminal statutes.

Petitioners' Brief in the Seventh Circuit in discussing the question of whether the rules in question were void for vagueness or overbreadth, urged the Court not to equate a school regulation with a statute, stating:

> "Furthermore, many courts have stated that school regulations because of the very nature of the educational institution and its goals and purposes should not be tested by the same requirements of specificity as are state statutes. See, e.g., Speake v. Graham (Miss. 1970), 317 Fed. Supp. 1253. 'Flexibility and elbow-room are to be preferred over specificity.' 317 F. Supp. 1265."

The first sentence of this quotation was taken from Jones v. State Board of Education (D. C.

Tenn. 1968), 279 F.Supp. 190, aff'd (6th Cir.) 407 F.2d 834, cert.gr. 396 U.S. 817, cert. dism'd. 397 U.S. 31, Reh.den. 397 U.S. 1018. This same brief also cited Baker v. Downey City Board of Education (D.C. Cal. 1969), 307 F. Supp. 517, and Sill v. Pennsylvania State University (3rd Cir. 1972), 462 F.2d 463 on the issue of vagueness and overbreadth. Thus the only case on this issue in the Petition for Writ of Certiorari which was not in Petitioners' Appellate Brief was Esteban v. Central Missouri State College (W.D. Mo., 1968), 290 F.Supp. 622, aff'd 415 F.2d 1077 (8th Cir. 1969), cert. den. 398 U.S. 965.

It is absurb to challenge petitioners' right to present this question for review since it was an important basis for the opinion of the Court of Appeals. The Appellate Court in declaring the Board rules unconstitutional for vagueness and/or overbreadth explicitly applied the same strict standards applicable to statutes, particularly criminal statutes. The dissent, recognizing this, stated that a majority of this Court might be inclined to accept the view of three of its members in Papish v. University of Missouri Curators, 410 U.S. 667, 677 (1973), that "insistence on equating, for constitutional purposes, the authority of the state to criminally punish with its authority to exercise even a modicum of control over the university (high school or elementary school) which it operates serves neither the constitution nor public education well."

Thus petitioners' question 1a was properly raised and briefed below and considered by

the Court of Appeals.

Elementary Schools

It is abundantly clear that the Board rules and injunction in question apply to both elementary and secondary schools, in fact, to all "students in the Indianapolis Public School system." (Petition, App. p. 6A) Since neither respondents nor the Court of Appeals deny this fact, it seems most strange that respondents would now object for the first time to petitioners' references to elementary schools. To imply that the proceedings below were limited to high schools and that respondents did not have an opportunity to brief or argue the application of the rules and injunction to elementary schools is a complete misrepresentation of the history of this litigation.

There is no question but that the case in the District Court concerned all Indianapolis public schools; the petitioners Brief in the Court of Appeals made countless references, arguments and discussed cases concerning elementary students. Respondents said absolutely nothing in their complaint, in the trial court proceedings or in their Court of Appeals reply brief to indicate that they believed the rules and subsequent injunction did not apply to elementary schools or that the Board's many references to elementary schools were irrelevant or improper.

The Court of Appeals stated that:

"The injunction is broad enough to cover enforcement of the particular rules at all schools under the jurisdiction of defendants." (Jacobs v. Board (7th Cir. 1973) 490 F.2d 601 at 610)

The Court then upheld the District Court's injunction and decision declaring Board rules unconstitutional yet at the same time refused to hold whether it would be constitutional to apply these rules to elementary schools. The dissent took exception to this obvious contradiction and the court's "failure to hold as to elementary schools of all places that the trial court's decision involved error." (Jacobs, supra, p. 611.)

Since the rules were all declared facially unconstitutional, it is the respondents who lack good faith in now implying that they could be validly applied to elementary schools. In addition, the District Court's Order permanently enjoined the Board from the promulgation or enforcement of any rule which would "subject any covered student to the threat of discipline because of the reaction or response of any other person to the written material ---." (Petition App. p. 14.)

Rule 1.1.1.3 (Disruption Rule)

Respondents claim that Rule 1.1.1.3 differs blatantly from Tinker and Eisner[1] and

1. Tinker v. Des Moines Independent School Dist., (1969), 393 U.S. 503; Eisner v. Stamford Board of Education (2nd Cir. 1971) 440 F.2d 803.

goes far beyond anything considered in prior Appellate decisions. This is a gross misinterpretation of those two cases.

Respondents base their entire argument on the phrase "likely to produce" in this rule which the District Court did not find vague or overbroad. In fact, the trial court also used the same phrase in its rewording of a rule likely to be found constitutionally acceptable. (Petition App. p. 14) The Seventh Circuit held that 1.1.1.3 was vague only in defining the consequences which would make a distribution of literature punishable. It did not find the phrase "likely to produce" vague as respondents imply. Instead, the Appellate Court held the phrase "productive of or likely to produce" overbroad simply because it erroneously believed that students are constitutionally entitled to distribute literature which causes disorder or a significant disruption in the school. (Jacobs, supra, p. 606.)

The Board doubts that many appellate courts would find the phrase "likely to produce" either vague or overbroad, especially after a careful reading of Tinker, supra, which emphasized that a reasonable anticipation or forecast of significant disruption warrants action by the school to prevent it. It is obvious in Tinker that where there is potentially disruptive conduct, or interferences with the work of the school or the rights of other students or threats of violence on the school property, reasonable action by school authorities is constitutionally permitted.

It was also suggested in Quarterman v. Byrd (4th Cir., 1971), 453 F.2d 54 at 59 n. 10, that:

> "Courts may well take note of the significant difference between symbolic speech, especially when directed towards a non-school matter, and the distribution of an underground newspaper in assessing the reasonableness of a judgment of likely school disruption. --- Tinker and Burnside (Burnside v. Byers (5th Cir.), 363 F.2d 744) involved worn symbols which were viewed by comparatively few students, while underground newspapers have a theoretically unlimited student readership and thereby a potentially more disruptive influence."

Although courts hold that school authorities may act to prevent an actual disruption, as a practical matter, since disruption Rule 1.1.1.3 authorized only subsequent, not prior restraints, it would be most unlikely that any student would be subjected to disciplinary measures for distribution of literature which did not, in fact, cause an actual disruption of the school.

1.3.1.1 (Distribution during class hours)

Much of respondents' brief is devoted to attempts to distort the rule prohibiting distribution while students are required to be in class. (Rule 1.3.1.1) Respondents are well aware that

this rule does not subject students to disciplinary measures for selling literature "at any time in any school simply because one or more classes were in session at some location within the school." (Respondents' Brief, p. 14) This rule simply disallows distribution during class time when students are required to be in the classroom. It is a misrepresentation to imply that only a few classes may be in session in a small part of the school when the fact is that classes are conducted continuously (except at lunchtime) throughout the entire school until a certain hour. Since none of the cases cited by respondents even discussed a similar rule, they can scarcely be valid authority for invalidation of the Board rule. For example, Hatter v. Los Angeles City High School Dist. (9th Cir. 1971), 452 F.2d 673, was concerned only with the rule which disallowed distribution before school commenced on property which did not even belong to the school.

Prior Restraint

Respondents' discussion of the issue of prior restraint is so irrelevant, misleading, and confusing that it is necessary to set the record straight. An important issue in this case is whether the United States Constitution prevents a school board from adopting reasonable rules which would require prior approval by school authorities of literature before its distribution in elementary and secondary schools and whether the second amendment of Board rule 11.05 (reprinted in Appendix F of Petition) which requires prior approval is reasonable and constitutional.

The original Board Rule 11.05 which required prior approval of student literature without providing any safeguards was the basis for the complaint filed against the Board. However, the invalidation of this original rule was not appealed and is not an issue in this case, as respondents' imply.

However, the validity of the Board's first amendment of Rule 11.05 is an issue. (Question 4) This rule (Petition App. F) also requires review and approval of student literature prior to distribution in the Indianpolis Public Schools, but it incorporates guidelines and procedural safeguards as suggested by other Circuits (2nd and 5th). The trial court, however, made it clear that no prior restraints would be tolerated and ordered the Board to further amend its rules. The Board complied with this order and submitted a second amendment of Rule 11.05 (the present rules) which allow absolutely no pre-distribution review, approval or censorship. This second amendment of Rule 11.05 (reprinted in Petition, Appendix 6A-9A), while not permitting any prior restraints did subject students to subsequent restraints (disciplinary measures ranging from reprimand to expulsion) if they distributed literature which was obscene as to minors, libelous, or cause a significant disruption, etc.

The trial court also declared certain sections of this second amendment unconstitutional (reprinted Petition, Appendix pp. 33-34A) The sections regulating obscene and libel-

ous materials were held valid and thus are not issues in this case, contrary to respondents' assertion. The sections of this second amendment which were held unconstitutional were appealed and are issues (covered by Questions 1 and 2).

With this background in mind, and the fact that only one rule (first amendment of 11.05) allowed any prior censorship or restraint, respondents' discussion of question 4 becomes completely unintelligible and irrelevant. Respondents did not even discuss the issue of whether the invalidation of the first amendment of Rule 11.05, which rule carefully followed the guidelines suggested by the Second and Fifth Circuits for a valid prior restraint regulation, was in conflict with those circuits. Instead, much of respondents' argument is based on whether original Rule 11.05 (prior review without safeguards) conflicts with decisions of other circuits. Yet this rule is not an issue since it was not appealed. Respondents also mention the obscenity rule which was held valid and therefore is not an issue. Most of respondents' "prior restraint" argument concerns the second amendment of Rule 11.05, although respondents are well aware that these rules contain no prior restraint since they do not require any written material to be submitted for prior review, approval or censorship. No prior screening and suppression of any literature is permitted under these rules. These rules allow only subsequent restraint or punishment, which

means, as respondents fully realize, that students may be subjected to disciplinary measures after they violate one of the rules, i.e., sell literature or force it upon others or distribute it in certain places at certain times or in such a way as to litter or disrupt the school. These rules give no school official the power to either review the contents of any literature or prevent its publication. The difference between prior and subsequent restraints was fully discussed in the Appellate Brief so respondents cannot in good faith profess ignorance and argue that the present rules allow prior review and censorship. Respondents are also aware that the law of Indiana requires the Board to promulgate written rules which inform students what behavior is prohibited before any student may legally be punished. (Public Law 130)

Obscenity

The validity of Board Rule 1.1.1.1 (which allows punishment of students for distribution of material which is obscene as to minors) is not an issue in this case as respondents imply.

Petitioners third question presented for review request two rulings of this court: (1) whether the written use or distribution of such words as "f---, screw, eat shit" by minor students in the special environment of the Indianapolis elementary and secondary schools is obscene as to minors and (2) whether students can be punished for the written use of such

language even if it is held to be filthy, vulgar and indecent, but not legally obscene as to minors.

Petitioners have never claimed that the filthy, obscene words and pictures found throughout the Corn Cob Curtain were more than a small percent of the total number of words and pictures. However, it is not the number of times an obscenity is written in a newspaper distributed in school to minors which should be the determining factor of its effect upon the minds of children and the accomplishment of educational objectives. "Fire" need only be shouted once in a crowded theater to cause complete disorder. If the word "f---" is printed ten times in a newspaper of 1,000 words which is distributed at school to a captive audience of children, many of whom are emotionally disturbed or mentally deficient, said newspaper is definitely going to cause erotic thoughts and disruption of the proper work and discipline of the schools.

Respondents also argue that any pre-1971 or Cohen cases which hold that school authorities may regulate such language by minors in schools should be disregarded. Petitioners submit that Cohen v. California, 403 U.S. 15 (1971), should be distinguished from the case at bar since Cohen involved a criminal conviction for wearing a jacket in the public hall of a court house, which was removed and not revealed in the court room.

Respondents have also failed to properly argue without misrepresentation the other questions presented. For example, the fifth question involved 17C, Federal Rules of Civil Procedure, but respondents' discussed only 17(a) of said rules. The cases cited by respondents are also irrelevant since the issue of the appointment of a guardian was not even raised or mentioned in any of them.

Conclusion

Wherefore, petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

Lila J. Young
Bredell, Martin & McTurnan
2430 Indiana National Bank Tower
Indianapolis, Indiana 46204
(317) 639-4294

Attorneys for Petitioners